

No. 21964

v. 3454

21964

IN THE

United States Court of Appeals

For the Ninth Circuit

LOREN FORD and FRANCES FORD,
Husband and Wife, and DAVENPORT
EQUIPMENT COMPANY, INC., a
Washington corporation,

Appellants,

vs.

INTERNATIONAL HARVESTER
COMPANY, a Delaware
corporation,

Appellee.

No. 21964

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BRIEF OF APPELLEE

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TABLE OF CASES

	<i>page</i>
A.B.C. Packard, Inc. vs. General Motors Corp., 275 Fed. (2d) 63.....	19
Aktiebolaget Bofors vs. United States, 153 Fed. Sup. 397.....	6
Austin vs. Wright, 156 Wash. 24, 286 Pac. 48.....	7
Brisky vs. Leavenworth Logging, 68 Wash. 386, 123 Pac. 519.....	11
Bushwick-Decatur Motors, Inc., vs. Ford Motor Co., 116 Fed. (2d) 675.....	19
Buyken vs. Ertner, 33 Wash. (2d) 334, 205 Pac. (2d) 628 (1949).....	15
Curtiss Candy Co. vs. Silberman, 45 Fed. (2d) 451.....	18
Doran vs. Seattle, 24 Wash. 182, 64 Pac. 230.....	8, 9
First Loan and Trust Co. vs. Schanche, 202 N. W. Reporter, 390 (South Dakota).....	12
Ford Motor Co. vs. Kirkmyer Motor Co., 65 Fed. (2d) 1001.....	19
Gordon vs. Parke & Lacy Machinery Co., 10 Wash. 18, 38 Pac. 755.....	13
Henderson vs. Bardahl International Corp., 72 Wash. Dec. (2d) 106, October, 1967 Advance Sheet.....	14
International Shoe Company vs. Carmichael, 114 Southern (2d) 536.....	18

TABLE OF CASES

	<i>page</i>
Kennedy vs. Meilicke Calculator Co., 90 Wash. 238, 155 Pac. 1043.....	10, 21
Lindquist vs. Mullen, 45 Wash. (2d) 675, 277 Pac. (2d) 724.....	8, 9
Organ Company vs. First Methodist Episcopal Church, 7 Wash. (2d) 310, 109 Pac. (2d) 798.....	7
C. D. Robinson vs. Barber F. Davis, 158 Wash. 556, 291 Pac. 711.....	9
Shelton vs. Fowler, 69 Wash. (2d) 85, 417 Pac. (2d) 350.....	16
Sims vs. Salvey, 234 S.W. (2d) 465 (Texas, 1950).....	7
Sterrett vs. North Fork Mining and Smelting Company, 30 Wash. 164, 70 Pac. 266.....	11
Taylor vs. Puget Sound Power & Light Company, 64 Wash. (2d) 534, 392 Pac. (2d) 802.....	9
Theurer vs. Condon, 34 Wash. (2d) 448, 209 Pac. (2d) 311.....	8, 9
Trethewey vs. Green River Gorge, Inc., 17 Wash. (2d) 697, 136 Pac. (2d) 999.....	11
United States vs. Fisher, 112 Fed. Sup. 233.....	6
Victor Safe & Lock Co. vs. O'Neill, 48 Wash. 176, 93 Pac. 214.....	16

TEXT

	<i>page</i>
34 Am. Jur. 110, Section 137.....	5
3 Williston on Contracts (rev. ed.) 2281, 2282, Section 811A.....	16

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ADDITIONAL STATEMENT OF THE CASE

In keeping with Appellant's brief we shall use the symbol "Tr." when referring to the Clerk's Transcript of Record and "R." when referring to the Court Reporter's Record of Proceedings.

Although the alleged promise to Ford in October of 1958

that no competing dealerships would be permitted included both the towns of Edwall and Harrington, the latter is not at issue because Ford withdrew his objection to the Kinzel motor truck contract at Harrington in 1959 (R. 88), and the farm equipment parts contract was cancelled May 1, 1962 (Def's. Ex. 117).

At the outset of negotiations in October, 1958 Harvester gave Ford a prospectus entitled "Sales and Profit Possibilities" (Plf's. Ex. 6) which contains the following at page 4:

"Although the analysis is based upon a selected normal trade territory, International Harvester Company's Dealer Sales and Service Agreement does not assign exclusive trade territories to any particular dealer. Others in the selected normal trade territory will be competing for the customers' trade—competitive dealers in the same town as well as the IH and competitive dealers in other towns. Nor will your dealership be confined in selling in only the territory referred to in this analysis."

From January, 1959 until Ford terminated the dealership, the parties executed eleven written Dealer Sales and Service Agreements on forms generally used by Harvester and covering farm equipment and motor trucks. (Finding VIII, Tr. 46, Def's. Exs. 101 through 111). The basic dealership agreement (Def's. Ex. 101) is a very comprehensive instrument consisting of eighteen pages of printing arranged under thirty separate sections which set forth in great detail the relationship between the parties from the inception to termination.

Some further statement as to the manner in which Overman Howell operating as St. John Hardware & Implement Company expanded into Edwall might be of assistance to the Court. Howell bought property in Edwall in the spring of 1960 and opened up a branch operation without telling Harvester nor seeking their permission for the reason "We thought it was none of their business." (R. 269) He further testified that he would not have discontinued the Edwall operation if Harvester had requested him so to do. (R. 272) Ford testified that Harold Berry, District Manager at Spokane for Harvester, told him in early 1961 that Howell threatened to sue Harvester if they tried to put him out of Edwall (R. 101) to which Ford replied: "What the hell do you think I'll do?" (R. 101) In commenting on this conversation the court said (R. 359):

"So right then he was informed they were not going to terminate St. John.

"Now he had the opportunity at that time, or within three years thereof, to bring his action for damages . . ."

And on the following page (R. 360) the Court continued:

"Oh, I think he pretty well knew right at that time, I can't draw any other conclusion, that they weren't going to terminate St. John, and the reason he knew it was that St. John had been an established dealership down in St. John and they were going to let him stay there. I think he knew that at that time. I don't think you could find anything else. There is where I have the problem. Right

then he had damage already, at that time, in 1961. He had been there, and he had been damaged, and thereafter he could bring his action any time within 3 years, couldn't he?"

Despite the fact that Ford knew in early 1961 that Harvester would not terminate the St. John operation, he continued to operate the Davenport dealership until the end of 1964.

ANSWER TO SPECIFICATION OF ERRORS

As pointed out in Appellant's brief, the sole question presented in his appeal is that of the Washington Statute of Limitations. The only Finding of Fact to which error is assigned is No. XV (Tr. 49). The Court found that the oral agreements between Harvester and Ford were breached no later than April of 1961 and under the 3-year statute of limitations any action was barred after April, 1964. This action was commenced in May, 1965 and both parties concede that the 3-year statute of limitations applies. The basis for the Court's finding that the breach occurred no later than April of 1961 is that the Dealer Sales and Service Agreements with the Edwall operation of St. John Hardware were approved under date of April, 1961, though dated February 6, 1961. (Def's. Exs. 112, 114, 115) Thus, assuming these agreements were not effective until April, 1961 and assuming that there could not be a breach of the oral agreements until an actual written dealership agreement was executed at Edwall. April, 1961 would be the latest date for

the commencement of the running of the statute of limitations. In reality, the statute commenced to run long before then. Ford testified he first learned of St. John's entry into Edwall in the fall of 1960. (R. 96) And, of course, he knew in early 1961 when he threatened Berry with suit that Harvester would not terminate the Edwall operation. (R. 101)

ARGUMENT IN ANSWER TO APPELLANT

Appellant's argument boils down to this: He had an oral agreement that Harvester would not permit a competing dealer to operate in Edwall while he was in Davenport. Even though this agreement was breached in early 1961, Ford could continue to operate at Davenport indefinitely but at any time he chose, even 20 years later, he could recover damages for the three years immediately preceding. We cannot conceive this to be the law for to follow such reasoning would destroy all statutes of limitation.

The universal rule is stated in 34 Am. Jur. 110, Section 137:

"In accordance with the established rule already discussed, the statute of limitations begins to run in civil actions on contracts from the time the right of action accrues. This, ordinarily, is the time of the breach of the agreement, and not the time that actual damages are sustained as a consequence of the breach. The gist of the action is the breach, not the consequential damages which subsequently accrue; such damages are not the

result of a new or continuous breach, but relate back to the original one which gave the right of action and without which they could not exist . . .”

While we have no particular quarrel with the authorities cited and discussed in Appellant's brief, we fail to see their application here. For example, the quotations from *Corpus Juris Secundum* and from *American Jurisprudence* are taken from sections dealing with covenants in deeds such as the covenant for quiet enjoyment. And the two oil and gas cases discussed on page 13 of Appellant's brief deal with implied covenants and oil leases peculiar to the Oklahoma area, as the trial Court pointed out. (R. 363-5)

Nor are the cases of *United States vs. Fisher*, 112 Fed. Sup. 233 and *Aktiebolaget Bofors vs. United States*, 153 Fed. Sup. 397, at page 14 and 15 of Appellant's brief applicable. Each of these cases deals with a *series* of violations of an agreement, each of which gave rise to a cause of action. In the *Fisher* case each *sale* contrary to the price stabilization regulation was a separate offense and as each occurred a cause of action arose. In the *Bofors* case each separate *export* of guns constituted a separate cause of action. The Courts were not holding that there was a day-to-day breach of contract after the first breach occurred as the Appellant argues here. Furthermore, in each of the two cited cases the defendant was the actor which performed the act of selling that damaged the plaintiff. Here the sales that allegedly hurt Ford were those of the Edwall dealer.

Harvester breached the alleged agreement when the dealer was permitted into Edwall, but the subsequent sales by Edwall were not individual breaches of the agreement between Ford and Harvester. This alleged agreement could be breached only by permitting a dealer to come into the area. *This was the act that gave rise to a cause of action.* A new cause of action did not arise every day thereafter ad infinitum.

Nor are the Washington cases cited by Appellant of any great assistance. The case of *Austin vs. Wright*, 156 Wash. 24, 286 Pac. 48, turned on the fact there was a 20-year contract guaranteeing payment of annual dividends; each year a new cause of action arose if the dividends were not paid. The case of *Organ Company vs. First Methodist Episcopal Church*, 7 Wash. (2d) 310, 109 Pac. (2d) 798, involved an agreement in a contract that the buyer would keep an organ insured. The buyer didn't, but the seller didn't find this out until fire destroyed the organ. If the seller had known of the breach, the statute would have started running at that time. Then the situation would have been the same as that presented in *Sims vs. Salvey*, 234 S.W. (2d) 465 (Texas, 1950) where a husband breached a divorce agreement to pay premiums on a life insurance policy on his life. He permitted the policy to lapse in 1932 and died in 1948. Upon his death his former wife sought to recover for breach of the agreement. In the discussion on page 473 the Court pointed out that the agreement required the husband to deliver receipts to the wife when the premiums were paid.

Davis, 158 Wash. 556, 291 Pac. 711. Furthermore, Ford was damaged at the time the oral agreement was breached in 1961 as the Court pointed out (R. 360) quoted earlier in our brief. At that point he could have sued for an injunction and damages which would have been substantially less than the \$100,000 sued for in this action. Instead, according to his theory, he had a right to continue to suffer damage and could bring an action at any particular point in time to recover the last 3 years thereof. Such accumulation of damages is not permitted. A similar situation was presented in *Kennedy vs. Meilicke Calculator Co.*, 90 Wash. 238, 155 Pac. 1043. There plaintiff was a distributor of the defendant and brought this action for damages he sustained during 8 months of operation because all of the calculators provided by the defendant were defective. The trial Court agreed with plaintiff and found what the damages were for 8 months but then cut them almost in two. The Supreme Court found the trial Court did so on the grounds that plaintiff should have mitigated his damages since he should have known at the end of 3 or 4 months that the calculators were all defective. On this point the Supreme Court said at page 240:

“We have not the benefit of the trial court’s reasons for concluding that the plaintiff was not entitled to all the sums which he apparently found in favor of plaintiff. We assume, however, that since the plaintiff had been engaged in selling what he contended to be a very defective and unsalable article for eight months, he should not be permitted to allow the damages to accumulate to such

an extent, but should have been able to determine his rights in a much less time, or not to exceed one-half the time for which he claimed, and with this view we are inclined to concur with the lower court and to hold that his conclusion was justified but not his finding. A careful consideration of the facts convinces us that no greater sum is allowable, and his finding of fact is corrected to that sum. *This was not a contract for hire under which plaintiff was engaged, but was a selling agency to sell a certain thing in exclusive territory. Plaintiff was as well aware of the extent of defendant's failure to comply with its contract at the end of three or four months as he was at the end of eight months, and we think the trial court was sufficiently liberal in his allowance.*" (Emphasis ours)

We fail to see the applicability of *Sterrett vs. North Fork Mining and Smelting Company*, 30 Wash. 164, 70 Pac. 266, or *Brisky vs. Leavenworth Logging*, 68 Wash. 386, 123 Pac. 519. These simply state that a cause of action arises when a tortious injury occurs. While *Trethewey vs. Green River Gorge, Inc.*, 17 Wash. (2d) 697, 136 Pac. (2d) 999, discussed at page 18 of Appellant's brief, involves a contract it was one for continuous employment. The Court found this to be an open account saying at page 719:

"However, as we have already indicated, the evidence shows and the court found, that if sufficient funds were not available to pay respondents' salary, under the terms of the agreement the unpaid amounts were to be carried forward on the books of the company, from year to year as a running account, against which were to be credited such amounts as were drawn by respondents from time to time. The contract of employment was for an indefinite

period, the services rendered thereunder by respondents were continuous, and the items of charge and credit were periodically entered each year; hence the statute of limitations did not begin to run until the services were terminated."

Assuming for the sake of argument that Ford had a "continuing contract" his cause of action arose when the first breach occurred. This question was squarely before the Court in *First Loan and Trust Co. vs. Schanche*, 202 N.W. Reporter, 390 (South Dakota), which involved a contract for continuing support. The Court said at page 391:

"... It may be conceded that the contract is a continuing contract, and the question is: When does a right of action accrue on a continuing contract so as to set the statute of limitations in motion.

"In determining when the statute begins to run upon the breach of a continuing contract, the question depends largely upon the inquiry whether a complete right of action accrues at the time of the first breach. If a full recovery of damages can be had upon the first breach, the statute then begins to run; and when this right of action becomes barred plaintiff cannot recover for any subsequent breach though it accrues within the statutory period before action."

In the case at bar when the alleged oral agreement was breached in early 1961, Ford had a complete remedy by an action for an injunction and accrued damages.

In concluding this phase of our brief, we fail to see how

any of the authorities cited by Appellant support his unique theory of a continuing breach of contract.

ADDITIONAL REASONS FOR DENYING APPELLANT'S CLAIM

Parol Evidence Rule

There is another legal defense which should deny Appellant the right to recover in this action. His entire case is based on an alleged oral agreement with the Spokane District Manager of Appellee in the fall of 1958 to the effect that if he took over the Davenport dealership, the Appellee would not permit any International Harvester farm equipment dealership to operate in Edwall "in competition with plaintiff's." (Finding VI and VII, Tr. 45) Subsequently on January 16, 1959 the parties entered into the first of the eleven written dealership agreements. Parol or extrinsic evidence should not be received to explain, contradict, vary, alter, add to or subtract from the terms of written contracts which are as clear and explicit as those before us. A somewhat analogous situation was presented in *Gordon vs. Parke & Lacy Machinery Co.*, 10 Wash. 18, 38 Pac. 755. This involved a detailed written contract for the sale of a business and an alleged oral sideline agreement not to compete. In holding that the trial Court erred in considering testimony as to the oral agreement, the Court said at page 21:

"Now the contract here to be considered was one of great detail, and entered minutely into all the matters undertaken by both parties, and was executed by both.

It covered the sale of the stock, accounts and lease of the place of business of the appellant in Spokane, with its furniture, fixtures and books. The complaint says that the respondent's purpose in making the purchase was to continue business in the same line theretofore followed by appellant, in Spokane, with the merchandise to be sold to him, and that the object of the agreement that appellant would no longer carry on business at that place was to prevent competition with him in the disposal of the goods acquired by him. If so, then, to the extent that the agreement referred to the goods which were the subject of the contract, it was certainly not collateral or independent, and we should expect to find some mention of the arrangement in a contract so precise in its terms and so formally drawn as this one. Not finding it there, the law concludes that the agreement alleged was not made, however much the appellant may have intended not to re-open business in Spokane."

The most recent application of the rule in a manufacturer-distributor case is *Henderson vs. Bardahl International Corp.*, 72 Wash. Dec. (2d) 106, October 6, 1967 Advance Sheet where the defendant sought to prove an oral agreement wherein plaintiff, a distributor of defendant, waived part of his commissions. On this point the Court said at page 118:

"The oral agreement, which Bardahl offered to prove, was prior to the execution of the written commission agreement of January 22, 1959 on which this action is based. The agreement is complete in itself and not ambiguous; there is no claim of accident, mistake or fraud. The trial court properly refused to admit parol testimony to vary the written agreement."

The dealership agreements themselves contain no grant of exclusive territories nor any assurance of freedom from competition and Ford was so advised in the prospectus, "Sales and Profit Possibilities" (Plf's. Ex. 6). Clearly the alleged oral agreement contradicts, adds to or varies the terms of the written instruments. Not only are these extremely detailed, clear and unambiguous but each contains a "merger clause" entitled "Agreement Complete" typical of which is the following:

"All understandings and agreements between the parties are contained in this agreement, which supersedes and terminates all previous agreements between the parties pertaining to the sale of the goods covered by this agreement. There are no oral or collateral agreements or understandings affecting this agreement."

The significance and conclusiveness of a "merger clause" has been recognized by the Washington Court in numerous cases. In *Buyken vs. Ertner*, 33 Wash. (2d) 334, 205 Pac. (2d) 628 (1949) the Court said at page 345:

"While the three propositions suggested by Mr. Wigmore may properly have a place in determining whether or not a written contract embraces the entire agreement between the parties, they must nevertheless be considered in light of, and subject to, the principle to which this court is committed, namely, that where a written agreement *purports* to cover the entire subject matter with respect to which the parties are contracting, and fraud or mutual mistake is not claimed, evidence of a contemporaneous or prior oral agreement contradicting or altering the terms of the writing is inadmissible." (Emphasis the Court's)

And in *Victor Safe & Lock Co. vs. O'Neill*, 48 Wash. 176, 93 Pac. 214 (1908) the Court said at page 179:

“Thus, the appellants solemnly said, over their own signatures, that the writing contains the whole contract between the parties, and that any further verbal agreements were waived.”

To the same effect see 3 Williston on Contracts (rev. ed) 2281, 2282 Section 811A:

“In most of the situations involving the application of a merger clause the presence of the clause is only an additional reason for reaching the same result that would be reached without it on the basis of the parol evidence rule . . .”

Nor can it be said that the alleged oral agreement was an independent, collateral contract for if the collateral agreement could reasonably be expected to be embodied in the written agreement, then the rule excludes evidence thereof. In the recent case of *Shelton vs. Fowler*, 69 Wash. (2d) 85, 417 Pac. (2d) 350, (1966) the Court, after noting that the contract before it had a merger clause and pointing out that the written instruments all contained very specifically detailed promises by both parties which were the consideration, applied the rule at page 95:

“In the present case, the parol evidence rule is applicable because the alleged agreements to improve the roads could reasonably be expected to be embodied in these particular instruments. The alleged promises were

claimed to be part of the consideration to be given by the seller to the purchasers in connection with the sales."

If there were a contemporaneous oral agreement to the effect that Harvester would not permit a dealership at Edwall it certainly was not distinct from and independent of the written dealership agreements. On the contrary, such an oral agreement would be an integral and major covenant or condition thereof.

Although the trial Court found that there was an oral agreement as alleged by Appellant, it concluded: "The 'parol evidence rule' does not apply to these oral agreements because they do not violate the terms of the written dealership agreements between Plaintiffs and the Defendant." (Finding XIII, Tr. 49, and Conclusion II, Tr. 50) But this applies the wrong test. The question is not whether an oral agreement "violates" a written agreement—the question is does it contradict, subtract from, add to or vary the terms of the writing.

In addition to holding that the action was barred by the Statute of Limitations, we respectfully submit that the trial Court should have concluded the testimony as to the alleged oral agreement was not admissible under the parol evidence rule.

Dealership and Exclusive Agency Cases

In addition to the reasons given above for denying relief to Appellant, there is a large body of case law which denies recovery to dealers under circumstances similar to the case at bar. Dealership agreements in general, including the ones at issue here, are illusory in that they are terminable at the will of either party or on comparatively short notice without cause and no specific amount of goods are involved, that is, the dealer is not obliged to buy any certain amount of the manufacturer's products nor is he obliged to handle the manufacturer's line exclusively. An example is the case of *Curtiss Candy Co. vs. Silberman*, 45 Fed. (2d) 451 which was a suit by a dealer to enforce a territorial agreement. The Court held this promise was no more enforceable than the dealership agreement itself which was terminable at will and imposed no obligation on the dealer to make any specific amount of purchases from the manufacturer. In that case the Court pointed out also that: "It does not appear that plaintiffs could have made the sales either to the other jobbers, or to the retailers to whom they sold, had the defendant not violated its agreement before revocation."

In denying a dealer damages in a suit against the manufacturer for breach of a franchise to sell shoes in a particular city, the Court in *International Shoe Company vs. Carmichael*, 114 Southern (2d) 436, held that even though the manufacturer was notified but refused to stop sales by a competitor, the manufacturer was not responsible for sales

by the competitor and any damages did not result from any breach of the alleged agreement. In the instant case Harvester is not responsible for the sales made by St. John Hardware at its branch store in Edwall, and any damages allegedly suffered by Ford were not the proximate result of Harvester's entering into a written dealership with St. John Hardware several months after it actually opened for business in Edwall. *St. John could have done business at Edwall without a dealership agreement indefinitely.*

In *Ford Motor Co. vs. Kirkmyer Motor Co.*, 65 Fed. (2d) 1001, the Court denied damages to a dealer for breach of an oral promise not to set up a competing dealership on grounds that the written dealership agreement was for an indefinite time, terminable by either party on written notice, and therefore too illusory to support an action for damages. The Court pointed out that if the manufacturer had abided by the oral agreement and given the dealer the second dealership instead of giving it to a third party, the manufacturer could have turned around and terminated the dealership by written notice and the dealer would have no recourse. In our own case, if there were an oral agreement by Harvester not to place another dealership at Edwall, but if in fact Harvester wished to do so, it could have terminated Ford at Davenport and then set up a new dealership at Edwall and there would be nothing Ford could do about it. For analogous situations see also *Bushwick-Decatur Motors, Inc., vs. Ford Motor Co.*, 116 Fed. (2d) 675; and *A.B.C.*

Packard, Inc. vs. General Motors Corp., 275 Fed. (2d) 63 which was decided by this Court in 1960.

The trial Court recognized the illusory nature of the dealership agreement in Conclusion of Law III (Tr. 51). One of our defenses at trial was the Statute of Frauds—the oral agreement was not to be performed within one year. The Court disposed of that defense in Conclusion III by reference to a Washington case “. . . and the fact that the dealership agreements between plaintiffs and the defendant herein were terminable by either party on 30-days notice.”

Damages

Some passing reference must be made to Appellant's alleged damages in view of the fact that the Court found (Finding XVI, Tr. 49) that but for the statute of limitations plaintiff would be entitled to \$39,300 damages of which \$28,800 represented salary for 3 years, 1962, 1963 and 1964, at \$800 per month. This portion of the Finding reads as follows: “In such event the Court would conclude that a reasonable salary would be \$800 per month, basing its conclusion on a prospectus, Plaintiff's Exhibit No. 6, entitled ‘Sales and Profit Possibilities’, which among other things purported to show that a dealer should make a profit of \$10,000 per year on a gross business of \$250,000, a sales figure that Mr. Ford would have reached if it had not been for the competition of St. John Hardware Company at Ed-wall and that of Kinzel at Harrington.” (Parenthetically

there is no mention of \$800 per month salary in the prospectus and the only testimony was that of Ford who stated he paid himself \$600 per month in 1959 and 1960, \$450 per month in 1961 and a total of \$400 in 1962. (R. 143-4))

Even a cursory reading of the prospectus shows that it is neither a promise nor a representation of fact. The Court itself practically ignored the prospectus saying at one point (Tr. 189) while defense counsel was cross-examining Mr. Ford:

“THE COURT: Is there any contention here that the prospectus is a part of the proceedings, so far as any representations made in it? I don’t think there is. If there is, I wouldn’t go along with that, because a prospectus is just what it is. I know what a prospectus is, and I don’t think it would be any part of an agreement that you give a person.”

Thus the Court itself has cut the ground out from underneath any finding of damages based on the prospectus. Furthermore, on the basis of *Kennedy vs. Meilicke Calculator Co.*, 90 Wash. 238, 155 Pac. 1043, previously discussed and as noted by the Court the dealership was terminable by either party on 30 days’ notice, Appellant should not be permitted to pile up his damages after the alleged oral agreement was breached in early 1961.

CONCLUSION

We respectfully submit that the dismissal of the action should be affirmed for the reason it is barred by the Statute of Limitations and for the additional reason that proof of the oral agreement is barred by the Parol Evidence Rule and the additional reasons set forth herein.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals of the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

.....
WILL LORENZ

Attorney for Appellee